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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT CANIZALEZ et al., Defendants and Appellants.	B218515 (Los Angeles County Super. Ct. No. KA080781) **ORDER MODIFYING OPINION AND DENYING PETITIONS FOR REHEARING** **[NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion filed and modified herein on July 20, 2011, be further modified as follows:

1. On page 27, footnote 12, the last sentence, beginning "On September 28, 2010," is deleted.

2. Beginning on page 31, part "***F. Geier or Melendez-Diaz***" is deleted in its entirely and the following is inserted in its place:

F. Bullcoming v. New Mexico

While this appeal was pending, the United States Supreme Court rendered the next installment in the *Crawford* line of cases, deciding *Bullcoming v. New Mexico* (2011) __ U.S. __ [131 S.Ct. 2705] (*Bullcoming*). In that case, the defendant was arrested for driving while

intoxicated (DWI). The main evidence against him was a forensic laboratory report certifying that the defendant's blood alcohol concentration was well above the threshold for aggravated DWI. (*Id.* __ at p. __ [131 S.Ct. at p. 2709].) Unlike the certificate sworn to before a notary in *Melendez-Diaz*, the report in *Bullcoming* was unsworn. (*Id.* at p. ___ [131 S.Ct. at p. 2717.) At trial, the prosecutor did not call the analyst who signed the certificate. That analyst was on unpaid leave for an undisclosed reason. (*Id.* at p.__ [131 S.Ct. at pp. 2709–2710].) Instead, the prosecutor called another analyst who was familiar with the laboratory's testing procedures but had neither participated in nor observed the test on the defendant's blood sample. (*Id.* at p. ___ [131 S.Ct. at p. 2709.) The state sought to admit the absent analyst's findings as a business record.

The Supreme Court held that the testimony of the surrogate analyst violated the confrontation clause. (*Bullcoming, supra,* __ U.S. at p. __ [131 S.Ct. at p. 2710].) It found no distinction in the fact that, unlike in *Melendez-Diaz*, in *Bullcoming* there was a witness present to testify regarding the absent analyst's report, stating, "As a rule, if an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness." (*Id.* at p. __ [131 S.Ct. at p. 2713].)

3. On page 33, the first full paragraph, first sentence, beginning "Even if admission" is deleted and the following sentence and footnote 14 are inserted in its place (renumbering of all subsequent footnotes is required):

We need not consider the outer limits of the decisions in *Melendez-Diaz* and *Bullcoming* or their impact on the question before us, for we conclude that in any event, even if admission of Dr. Scholtz's testimony regarding the autopsies performed by Dr. Poukens constituted a violation of

Crawford, the error was harmless beyond a reasonable doubt for the reasons set forth in parts I and IIA9, *ante*. (*Lilly v. Virginia* (1999) 527 U.S. 116, 139–140.)[14]

[14]Justice Sotomayor's concurring opinion made clear that the Court's holding in *Bullcoming* did not necessarily extend to all situations, including one "in which an expert witness was asked for his [or her] independent opinion about underlying testimonial reports that were not themselves admitted into evidence." (*Bullcoming*, *supra*, ___ U.S. at p. ___ [131 S.Ct. at p. 2722].) Moreover, the United States Supreme Court granted certiorari in *Williams v. Illinois* (2010) 939 N.E.2d 268, in which the question of whether the expert opinion issue in Justice Sotomayor's concurrence is likely to be addressed by the Court.

There is no change in the judgment.

Appellant Robert Canizalez's petition for rehearing is denied.

Appellant Martin Morones's petition for rehearing is denied.

BOREN, P. J. DOI TODD, J. ASHMANN-GERST, J.